

# Ethical responsibilities when using *locum tenens*

SADJ July 2015, Vol 70 no 6 p264 - p265

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*Locum tenens* is usually a position that is offered when a practitioner in private practice is going on holiday, attending a congress, taking study leave or is absent from practice due to illness or other reason, and therefore the appointment is of short duration. The term *locum tenens* originates from the Middle Ages and means "one holding a place" and in the 1970s was generally used by medical facilities where there was a shortage of medical doctors.<sup>1</sup> Remuneration is usually based on a percentage of fees earned, or a set salary or a small basic salary coupled with a percentage of gross earnings above an agreed figure. Often when patients realise that their dentist will be returning in the near future, many prefer to await their return rather than being treated by a stranger, therefore it is preferable for a *locum* to accept a fixed salary or a basic salary plus commission.<sup>2</sup>

In many instances *locums* are appointed by dental practitioners without their thinking through the legal consequences of the appointment. In legal terms when something goes wrong either with a patient or with the practice, it is very important to establish whether a *locum* was appointed as an employee or as an independent contractor for the period that he or she has to stand in for the practitioner.<sup>1</sup> The exact position of a *locum tenens* will depend on the contract that he or she has with the practice owner. In some instances he or she would be considered as a 'servant' (employee), and in others as an 'agent of the owner' (independent contractor). It is clear, however, that in any instance a *locum* could be sued for his/her own negligent action, because of an individual's liability for his or her own acts.

If a *locum* is appointed as an employee, the rights of employees under the Labour Relations Act<sup>3</sup> and the Basic Conditions of Employment Act<sup>4</sup> are important considerations depending on the amount of remuneration the *locum* will receive. In addition, the dental practitioner (employer) could be held liable for any unlawful and/or negligent conduct of the *locum* (employee) while he/she is performing a duty for the practice. This responsibility is termed 'vicarious liability'. It is a doctrine of liability without fault, meaning one person

is held liable to a third party for the unlawful act of another. In the context of an employment relationship, the practitioner can be held liable for the unlawful acts of an employee – or the dentist who employs a *locum* as an employee can be held liable for the unlawful or unprofessional acts and omissions of the *locum* whether or not they were acting according to instructions given.

However, although an employer carries this liability for the acts of his/her employees, every individual remains liable for his or her own acts, and thus a claim of negligence could be brought against the employee, the employer or both.<sup>2</sup> If a *locum* is appointed as an independent contractor, labour legislation does not apply at all, and the doctrine of vicarious liability becomes applicable only if an incompetent *locum* is appointed or, as stated earlier, the *locum* acts in such a way as to cause prejudice to third parties. The *locum* as an independent contractor is hired solely to provide services as a substitute clinician for a limited period of time. While assigned practice hours may exist, such clinicians (independent contractors) exercise their own professional judgement in treating patients.<sup>1</sup> It thus seems a much safer option for a dental practitioner to appoint a *locum* at all times as an independent contractor and never as an employee. If the *locum* is appointed as an employee, the dental practitioner who hired or employed the *locum* may very well be liable for any improper acts or omissions by the *locum*.

The Health Professions Council of South Africa<sup>5</sup> has clear guidelines regarding the appointment and use of *locum tenens* under the principle of duty of care of the health professions. To ensure patients' best interests or well-being, practitioners cannot "employ any intern, health care provider in community service, or health care practitioner with restricted registration with the HPCSA, as a *locum tenens* – or otherwise - in their own or any associated health care practice". Dental practitioners should take care when appointing a *locum* to ensure that the applicant is duly qualified and registered. The HPCSA has taken disciplinary action and meted out hefty fines and temporary suspensions against some practitioners who have permitted unqualified or unregistered persons to act as *locum tenens* (whether appointed as employees or independent contractors).

There is not much guidance given either by the Health Professions Act or the HPCSA Ethical Rules regarding

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whether the appointment of a *locum* should either be as an employee or as an independent contractor. It is up to the practitioner (employer) and the *locum* to determine the contents of the contract of employment. As mentioned above it is important to distinguish between an 'employee' and an 'independent contractor' since the law attaches different consequences to either appointment. If a *locum* is appointed as an employee, labour legislation will be applicable to the contract of employment, which will not be the case where an independent contractor is involved.<sup>1</sup>

The Health Professions Act<sup>6</sup> does not address the appointment of a *locum* directly; neither does the Act indicate whether a *locum* should be appointed as an employee or an independent contractor. Section 9 of the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974 determines the following regarding *locums*: a practitioner shall employ as a professional assistant or *locum tenens*, or in any other contractual capacity and, in the case of *locum tenens* for a period not exceeding six months, only a person –

- (a) who is registered under the Act to practise;
- (b) whose name currently appears on the register kept by the registrar in terms of section 18 of the Act; and
- (c) who is not suspended from practising his or her profession.

Section 18 of the same Rules states that:

- (1) A practitioner shall accept a professional appointment or employment from employers approved by Council only in accordance with a written contract of appointment or employment which is drawn up on a basis which is in the interest of the public and the profession.
- (2) A written contract of appointment or employment referred to in sub rule (1) shall be made available to the Council at its request.

The Ethical Rules to the Act thus determine that a *locum* cannot be appointed for a period exceeding six months and that the *locum* is registered as a health practitioner with the HPCSA. Ideally the contract of appointment should be in writing and if a member of the HPCSA would like to see such a contract of appointment, it should be made available. If there is no written contract to stipulate whether the *locum* is an employee or an independent contractor, this complicates matters if a dispute arises. In such an instance the courts will fall back on the reality test to determine the position of the *locum*. The reality test is applied by the courts to determine whether an employee or an independent contractor is involved in a dispute. Previously the courts relied on other common law tests but they proved to be inadequate over time.<sup>1</sup>

When a patient seeks care from a professional person, it would be a reasonable expectation that the person was trained properly, appropriately skilled and was competent to carry to deliver such care. This is often described a 'duty of care' owed by the provider to the recipient. An extension of the duty of care is the presumption that an appropriate standard of care will be provided.<sup>7</sup> In the practice of dentistry there is a more benevolent and protective aspect of one's duty to care both in terms of an expectation that one will always try for the best for the patient and also with regard to the ethical principle of *primum non nocere* – 'first do no harm'. Therefore if the legal aspect of one's duty of care is concerned with

reasonable skill and care, the ethical aspect expects us to put the patient's best interest first and certainly above one's own personal and professional interest.

The Consumer Protection Act<sup>8</sup> applies to every transaction occurring in South Africa involving the **supply of goods or services** in exchange for consideration, unless the transaction is exempted from the application of the Act. For the purposes of the Act a patient is considered a "consumer". A dental practitioner is seen as a "service provider". "Service" in a dental context is a consultation with a dental practitioner, the dental advice rendered by such a practitioner, or any dental intervention, such as an operation. The aim of the Act is to protect and develop the social and economic welfare of consumers, especially vulnerable consumers.

If a practitioner uses a *locum*, the practitioner must be cognisant of the fact that the *locum* becomes part of the supply chain and is a participant in the contract. Consumers who suffer any harm can sue anyone who is deemed part of the "supply chain" and this may include both the dental practitioner and *locum*. The effect of the Consumer Protection Act in a Health Professions context has not been tested in the courts yet, but inclusion of a clause regarding the Act in a contract with the *locum*, will ensure that he or she forms part of the supply chain should any action arise.

## CONCLUDING REMARKS

It is the duty of the dental practitioner in private practice to inform all patients whenever a *locum tenens* is used. This could be part of the informed consent process, and it should be noted on the report by the *locum* when he or she actually sees the patient.<sup>1</sup> In all cases it would be better for the practitioner to appoint a *locum* as an independent contractor, because the *locum* himself or herself would then be held liable for the alleged unlawful or unprofessional conduct. An independent contractor would have to face cases of delictual negligence on his or her own whereas the employee is "covered" by vicarious liability.<sup>1</sup> Finally, contracts should be drawn up in writing and the Consumer Protection Act should also be included to the benefit of both the practitioner and the *locum*.

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